IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.411 OF 2006
IN
NOTICE OF MOTION NO.1347 OF 2006
IN
SUIT NO.1176 OF 2006

Verite Trust Co. Ltd. ..Appellant.
(Orig.Plff.)

Vs.

Anil Kumar Chamanlal & Ors. ..Respondents.
(Orig.Defts.)

Mr.J.J.Bhat, Senior Advocate with Mr.S.Sen i/b.Jaikishan Lakhwani for the Appellant.

Mr.S.H.Doctor, Senior Advocate with Ms.Leena Kapadia i/b.M/s.Pandya Gandhi, Advoates for the Respondents.

CORAM: DR.S.RADHAKRISHNAN AND S.J.VAZIFDAR, JJ.

DATED: 9TH AUGUST, 2006

P.C. :

This is an Appeal against the order of the learned Judge refusing ad-interim reliefs on the ground that there is no concluded agreement between the parties, of which specific performance has been claimed.

2. The Appellant is the Plaintiff. Defendant Nos.1 to 3 are Respondents 1 to 3 in the same order. Respondent Nos.1 and 2 own 100% of the equity shares

of Respondent No.3, Juhu Hotels Pvt. Ltd. The suit is filed by the Appellant for a declaration that the contract and/or oral agreement between Defendant Nos.1 and 2 and the Appellant is valid and binding, for a mandatory injunction directing Defendant Nos.1 and 2 to execute a share transfer agreement and/or transfer 100% shares of Defendant No.3, held by them, to the Appellant. In the alternative, the Appellant has sought a mandatory injunction directing Defendant Nos.1 and 2 to transfer 100% shares of Defendant No.3 to the Appellant. The Appellant has sought damages in the further alternative.

3. The Appellant moved an application for ad-interim reliefs, inter-alia, to restrain the Respondents from selling, transferring and encumbering the said shares and for the appointment of the Court Receiver in respect thereof. The learned Judge rejected the application for ad-interim reliefs on the ground that there was no concluded agreement. The learned Judge held that the correspondence exchanged between the parties solicitors was without prejudice and that the draft agreement exchanged between the respective solicitors contained several changes.

4. We are in respectful agreement with the learned

Judge and would refer to a facts in support of the reasons.

5. The Appellant's case is that an agreement had been entered into for the purchase of the said shares at a price of Rs.1,25,00,00,000/-. The first document relied upon by the Plaintiff is a document, admittedly in the handwriting of Respondent No.2, but signed by one Pravin Kotak, who was the Appellant's representative. The writing reads as under :

> "Recd from MR. PRAVIN.KOTAK cheque No.897803 dated 17.2.06 drawn on Bank of Rajasthan for the amount of One Crore Rupees only towards the sale of shares of Juhu Hotel Pvt. Ltd. as a deposit. This is pending providing further details such as legal search list of durables, immovables etc. Total consideration for 100% shares is One Hundred and Twenty Five crores.
>
> Sd/-
> (Pravin Kotak)"

6. The cheque referred to in the above writing was admittedly never encashed. Our judgment however is not based as a consequence of the same.

7. Firstly, this document is at variance with the

alleged oral agreement which the Appellants contend preceded the writing. This oral agreement is pleaded in paragraph 5, wherein, the Appellant has stated that the consideration was subject to adjustment as follows :

> "i the amount was to be increased by any cash in bank or other agreed assets and/or;
>
> ii reduced by any undisputed tax or other liabilities as reflected in the Companies balance sheet and which remained unpaid on the date of the sale."

8. It would be convenient to note at this stage that the prayers do not specify the oral agreement, of which performance is sought. During the hearing before us Mr.Bhat submitted that the oral agreement of which specific performance is sought, is the one pleaded in paragraph 11 of the plaint. As we shall demonstrate later, the agreement pleaded in paragraph 11 is substantially different from the one pleaded as above.

9. Pursuant to the said writing, a draft MOU was sent to the Appellant’s Advocate as an attachment to the Respondent’s Advocate’s e-mail dated 9.3.2006

(Exhibit "C" to the plaint) The draft was expressly stated to be "without prejudice". The draft also contains several blanks. There is some dispute as to the contents of the draft. The dispute pertains to which of the parties incorporated the changes therein indicated by computerized track changes. Considering the view we have taken it is not necessary to go into this question. As we shall now demonstrate there was admittedly no concluded agreement at least till 29.3.2006.

10. It is important to note that the Appellant's Advocate by a letter dated 16.3.2006 referred to the aforesaid e-mail dated 9.3.2006 and requested the Respondent's Advocates to :

> "..... fix up immediate appointment to enable us to finalise the MOU and proceed further in the matter".

That the Appellant's Advocates stated that they were holding the earnest money deposits in the Appellant's account since long and that the Appellants were anxious to sign the MOU before the end of the following week does not alter the fact that the agreement was yet to be finalised. It would

only indicate the Appellant’s earnestness in negotiating the agreement.

11. Thereafter, the Respondent’s Advocate forwarded an e-mail dated 21.3.2006. The same contained an attachment, being another draft MOU, also expressly stated to be "without prejudice". The Appellant’s difficulties however do not end here.

This MOU also contained various changes and counter proposals as indicted by the computerised track changes therein. There is a substantial point on which there was no finality. Clause 5(d) of the former MOU required the Appellant to pay a further sum of Rs.2,00,00,000/- to the Respondents in addition to the sum of Rs.5,00,00,000/- to be paid as earnest money. Clause 5(d) then provided that in the event of the Appellants defaulting in making the payment of the balance consideration, the MOU would come to an end and stand terminated and, in that event, the Respondents would be entitled to forfeit a sum of Rs.7,00,00,000/- and refund all other moneys if so received, without interest. In the subsequent draft MOU, clause 5(b) stood deleted. Further, clause 5(d) was proposed to be altered by restricting the amount to be forfeited to only Rs.5,00,00,000/-.

These are obviously substantial terms which unless finalised, would leave what transpired between the parties at the stage of negotiations.

12. In these circumstances, no concluded contract can be said to have been arrived at. This position is virtually undisputed. The doubt, if any, is removed by a letter dated 29.3.2006 addressed by the Appellant's Advocates to the Respondent's Advocates.

13. The Appellants stated in their letter dated 29.3.2006 that they were agreeable to paying the initial deposit of Rs.5,00,00,000/- to the Respondents adding however :

> "provided your clients (Respondents) agree to create charge over the property".

The Appellants further insisted on the Respondents giving them a power of attorney for dealing with the Municipal Corporation and other authorities to obtain permission for development. The conclusion to the letter is of crucial importance. It reads as under :

> "....

> if your clients are unwilling to give Power of Attorney, then in such an event our clients would be reluctant to proceed further. Please let us know your clients stand on the above two issues at the earliest."

14. There can now be no doubt that at least till 29.3.2006 there was no concluded agreement between the parties.

15. Faced with this, Mr.J.J. Bhat, invited our attention to paragraph 11 of the plaint in which it is alleged that thereafter the Appellants orally agreed that they would not insist upon the terms as set out in their solicitor's letter dated 29.3.2006 and that the Appellants conveyed through their solicitors to the Respondent's solicitors their unconditional acceptance to the MOU as drafted earlier. It is further alleged that the Respondent's solicitors alleged that the blanks in the draft MOU remained to be filled-in and asked the Appellant's solicitors to meet them on the following Monday for completing the documents and executing the same.

16. It is important to note that admittedly the above decision of the Appellants was communicated by the Appellant's solicitors not to the Respondents but

to the Respondent's solicitors. The Respondent's solicitors naturally had to seek the Respondent's acceptance thereof. Admittedly, as pleaded in paragraph 12 of the plaint, the Respondent's solicitors informed the Appellant's solicitors on

3.4.2006 that the Respondents had instructed their solicitors not to proceed with the matter.

17. Thus, firstly, even assuming everything that is stated in paragraph 11 and 12 to be correct, there was admittedly no confirmation from the Respondents themselves. The matter still continued in the realm of proposals and counter proposals without there having come into existence a concluded and binding agreement.

18. Secondly, it is pertinent to note that the Plaintiff's case expressly pleaded in paragraph 14 of the plaint that the agreement to sell was finalised on or before 17.2.2006 and it is only the modalities which were to be discussed. As we have already demonstrated, as on 17.2.2006, there was no concluded contract. Parties were still negotiating terms

necessary to bring into existence a concluded contract.

19. Added to this is the fact that the draft MOUs were made expressly without prejudice. In the facts and circumstances of this case, they were indeed without prejudice. The use of the expression was not a mere formality entitling the Court to ignore the same. What transpired between the parties was, in fact, and in substance, strictly without prejudice.

20. In the circumstances, the Appeal is dismissed.

(DR.S.RADHAKRISHNAN, J.)

(S.J. VAZIFDAR, J.)